Frequently Asked Questions:

General Questions:

- 1. Does Act 291 apply to all State and County departments and agencies?
 - a. Yes, Sections 1, 2 and 3 of Act 291 regarding prompt payment and retainage applies to all State and County departments and agencies. Section 4 of Act 291 regarding contract price adjustments apply to all State and County departments and agencies except Civil Defense and Emergency Acts, Hawaii Tourism Authority, Hawaii Hurricane Relief Fund, new century charter schools and University of Hawaii Research Corporation of the University of Hawaii which are exempt from 103D, Hawaii Revise Statues.
- 2. When does Act 291 go into effect?
 - a. Section 2 Prompt Payment and Section 3 Retainage goes into effect for contracts formed on or after July 1, 2007. Section 4 – Contract Price Adjustments applies to all existing and new contracts formed on or after July 1, 2007.
- 3. Can a contractor always bill for stored materials?
 - a. DAGS, allows for 100% billing of stored materials provided required invoice, insurance and storage arrangements are demonstrated and certified.
- 4. Provide an example of the contract language that DAGS will use to implement Act 291.
 - a. Please see the following link for the Public Works Division's Interim General Conditions, TG 00700 v07.08 item 1.02, M, which binds the requirements of Act 291 to our construction contracts: http://www.hawaii.gov/pwd/Members/qc/dccmanual/TG00700v0708.doc
- Provide an example of State of Hawaii Public Works Division's book keeping mechanism to determine if the retainage and prompt payment portions of Act 291 are enforced.
 - a. Enforcement will be via General Contractor certification of payment retainage on a supplemental report within our Monthly Payment Estimate forms. The retainage worksheets (Grey colored Tabs labeled: 'Basic Contract Retainage' and 'Change Order Retainage') within our Monthly Payment Estimate workbook shows a sample billing request where a contract retainage of 5% and subcontract retainage of 10% is being withheld. If a condition dictates subcontract retainage and partial or complete release, the certification portion of this report will also be used to police that amount. If there is question on whether proper retainage amounts are being held, DAGS will defer to the General Contractor's certified supplemental retainage report. Link to DAGS Monthly Payment Estimate form: http://www.hawaii.gov/pwd/Members/ib/forms/payest.xls
- 6. Does this law impose restrictions on subcontractor agreements with the general contractor?
 - a. Act 291 does not preclude contractor/subcontractor agreements.

<u>Section 2 – Prompt Payment Questions:</u>

- 7. If a subcontract is complete, does the State have to release all funds associated with the subcontract retainage?
 - a. Provided that proper Monthly Payment Estimates and documents are satisfied, the State must release the subcontract retainage.
 - Act 291 provides for prompt payment of subcontract work completed at any point in the contract contingent on submitting proper Monthly Payment Estimates and documents.
- 8. Within how many days will an agency have to pay after receiving a contractor billing?
 - a. 30 days.
 - b. Once the general contractor receiving final payment, the general contractor has 10 days to pay the subcontractor.

<u>Section 3 – Retainage Questions:</u>

- 9. If the subcontract stipulates that the contracting agency must withhold subcontractor retainage and with proper and prior notification of the contracting agency when is subcontractor retainage released?
 - a. If the contracting agency holding of the subcontractor's retainage is within the subcontract language and with proper notification of the agencies' prior to the start of work, notification to the State and County of the completion of subcontracting work will result in State and County release of that subcontractor retainage regardless of project phase or level of completion.
- 10. Is subcontractor retainage paid directly to the subcontractor?
 - a. DAGS will pay the contractor for properly completed work, including any subcontractor retainage release.
- 11. Does this law affect subcontractors of the subcontractor?
 - a. Yes.
- 12. What is the amount of retainage that agencies can retain on a construction contract?
 - a. No more that 5% up to 50% on the performance of the contract and no additional amounts there after contingent upon satisfactory progress. If progress is not satisfactory, the Contracting Officer has the discretion to continue retention up to 5%.
- 13. What is the amount of retainage that a general contractor can withhold from a subcontractor?
 - a. Provided that an acceptable bond or another forms of collateral, acceptable to the contractor, is provided, the contractor can not withhold more than the contract retainage.

- 14. What if subcontractor does not want to participate with government holding their retainage?
 - a. Per Act 291 Section 3.e.2.A&B, the subcontractor may make an agreement with the contractor to not have the government agency hold their retainage provided that the contracting agency is notified in writing of the such an agreement.

Section 4 – Contract Price Adjustments Questions:

- 15. Under Act 291, Section 4, is the time requirement to provide a change order in terms of working or calendar days?
 - a. Calendar days.
- 16. Does the DAGS Public Works Force Account form apply for both General and Subcontractor daily force account activities?
 - a. Yes, the DAGS Public Works Force Account Report can be used for all daily force account activities. Formulas in the form can be manipulated.
- 17. How many tiers of subcontract work does the Overhead and Profit rate shown in Section 4 apply?
 - a. Not more than 3 markup allowance line items additions not exceeding the maximum percentages will be allowed for OH&P, regardless of the number of tier subcontractors.
- 18. Does the time requirement for the agency to issue an executed change order apply to all change orders?
 - a. Only in the absence of an agreement does the Section 4 time factor to issue a change order apply.
- 19. On which date will the new change orders Overhead and Profit rates apply?
 - a. All on-going projects will receive the 20% direct labor and 10% subcontract Overhead and profit mark-ups as applies.
- 20. What is the reason for increasing the force account overhead and profit amounts from the present 7% subcontractor mark-up and 15% direct work to 10% and 20% respectively?
 - a. Prior DAGS contract conditions allowed for the 10% and 20% mark-up on change orders. Act 291 restores these prior contract conditions.
- 21. In the absence of an agreement on change order work and force account work is directed by Act 291, Section 4; what penalties apply to the government agency if change order paper work is not returned in time period specified by section 4?
 - a. A complaint can be filed with the State Procurement Officer for review of State Procurement Code violations. The State Procurement Officer will determine reprimand if warranted.

End of FAQ